THE CHILDHOOD OF CATV

This year Community Antenna Television (CATV) systems will celebrate their twentieth year of existence. One of the fastest growing industries of the Sixties, CATV was virtually unknown during the first half of its life. Although it is potentially one of the most significant developments of the electronic age, the CATV industry has suffered from at least two major problems in its upbringing. Even though large for its age, the infant CATV industry has until recently been almost totally without the strong disciplinary influence of the Federal Communications Commission and has been permitted to grow to a nearly unmanageable size without control. The second problem, one related to the lack of discipline, is that CATV systems have been unable to get along with the other sections of the still young[1] television broadcasting industry. The broadcasters view with jaundiced eye the standard CATV practice of "playing with other people's toys"—the use and retransmission of copyrighted programming material without the permission of the copyright holder or the licensee. The purpose of this note will be to explore the youth of this *enfant terrible* of the communications industry and, hopefully, gain some insights into its future.

I. The Formative Years

CATV systems are, in essence, electronic aids to reception of televised signals. They enable a subscriber to receive signals on his home television set which he could not otherwise receive because of distance from the broadcasting location or intervening obstacles. The systems use *master antennas* which are usually located on high ground far from the sets of the subscribers. The master is a platform for several antennas each of which is carefully aimed and tuned to receive only one broadcast signal at its greatest intensity. The signals received by the master antenna are transmitted to the amplification equipment which *demodulates* the signal, separating it from the carrier wave, then amplifies it, applies it to a new carrier wave sometimes on a different frequency, and transmits it on to the cable to the homes of the subscribers.[2] This signal may also be sent on the

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1 [T]he first commercial television license was granted to WNBT, now known as WRCA-TV, in New York City. The construction permit and license were issued on June 17, 1941, effective July 1, 1941.
Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 483 n.3 (1956).

2 The CATV operators usually lease space on utility poles for the cable as well as for amplifiers which are mounted on the poles or placed in sheds along the route

cable to a common carrier microwave facility for long distance transmission.

The courts have held various views of the role of CATV in the communications industry. Of the two most significant of these views the first is that the CATV system is a mere passive extension of the subscriber's television set, which increases his ability to receive signals in the same manner as a *house antenna* which serves an apartment building.[3] Secondly, other courts have seen the activities of the CATV system in receiving signals, amplifying them, choosing which are to be seen, and distributing them to subscribers who pay a monthly charge, as sufficient to make the CATV a regular member of the broadcasting industry. This difference in view coincides with the various theories used to bring CATV operations within the Copyright Act,[4] or to exclude them. The former theory, however, has received the blessing of the United States Supreme Court.[5]

The first CATV systems were small, carrying only two or three stations on their cables. They were used primarily to provide service to areas which were unable to receive nearby stations. When the first systems were constructed, it was not contemplated that they would eventually begin to employ a vast network of common carrier microwave systems to carry signals over distances far too great for off-the-air signals. It was impossible to predict that in 1967, the FCC would be able to report to Congress that:

> CATV serves some 10 million viewers in more than 2,723 communities. Some 1,770 communities have franchised CATV systems not yet in operation and more than 1,250 communities have CATV applications pending.[6]

Technological advances have enlarged the capacity of the cable first to twelve, now to twenty-four, and perhaps in the future to all eighty-four possible television channels. This almost unbelievable growth has triggered the problems now existing.

The struggle between CATV and broadcasting interests is, in essence, a problem of competition for off-the-air television broad-

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of the cable. The signal thus amplified, however, is not necessarily perfect. A CATV operator can only amplify the signal as it is received by the master antenna.

3 *Hearings before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 662 (1959).

4 17 U.S.C. §§ 1-216 (1964).

5 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400 (1968).

6 33D REPORT TO CONGRESS 60 (1967).

casting when none was expected by the broadcasters. They are faced with a new form of competition which, although it cost more than off-the-air television, is apparently more desirable to the viewers. The complaints of the broadcasters in this area are generally economic. CATV systems are said to fragment audiences, reducing the advertising fees charged by the broadcasters and causing some advertisers to go to radio and newspapers for their purely local needs. In spite of the larger audiences, a delicatessen owner in New York would not be well disposed to pay television rates for a commercial viewed in Woodville, Ohio. While the broadcasters can cite little to prove their claims of damage to broadcasting stations, some of their arguments have an economic validity which the CATV operators would rather ignore.[7] The CATV owners, on the other hand, can cite their own statistics and incidents to show that CATV systems are actually beneficial to television broadcasting. They note in particular a few thriving UHF stations which receive far more viewers than anticipated due to the fact that their signals are placed on the cable in a manner which enables any set to tune in on them. But especially, the CATV operators argue that without the cable, many people would have no television at all, a situtation which seems to be somewhat un-American.[8] With the issues thus joined, it would seem proper to review what has been done to eliminate at least some of the dissension.

II. CHILDHOOD: A DISCIPLINARY PROBLEM

A. *Federal Regulation of CATV*

The first CATV systems were not only of relatively minor concern to the broadcasting industry, but also to the Federal Communications Commission. The only regulatory action taken by the FCC with regard to CATV operations in the first decade of their existence was a setting of standards to cover the rare situation where the cables "leaked" and in effect broadcast signals which were not intended to go over the airwaves.[9] The Commission did little more than set standards for the construction and insulation of the cables to prevent this problem.[10] In 1959, at the same time that broadcas-

7 *See generally*, SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY (1965).

8 *First Report and Order (CATV)*, 38 F.C.C. 683, 694-95 (1965) [hereinafter cited as *First Report*].

9 21 Fed. Reg. 5368 (1956).

10 *Id.*

ters began to rise up against the menace of CATV, the FCC in its *Inquiry into the Development of CATV and Repeater Services*,[11] appeared to take the position that it had no power to regulate CATV in any manner other than to control the actual emission of energy.

In the *Inquiry*,, the FCC posed various questions concerning its power to regulate CATV systems, answering all in the negative.[12] The question of "jurisdiction" was considered under several headings. First, the FCC determined that it had no jurisdiction over CATV as a common carrier. In a CATV operation, the subscriber *must* take whatever signals the operator places on the cable, while the definition of common carrier used by the Commission requires some notion of choice by the customer of what signals are to be carried.[13] The Commission then quickly dismissed the assertion that jurisdiction could be assumed under the power to control broadcasters, since CATV transmission to customers are entirely by wire, any radio links being only between the "head end" of the cable and the master antenna, and never to subscribers.[14] The Commission also dismissed the assertion that through the use of its plenary power granted by Congress over all areas of communications it could regulate CATV, stating that" . . . we do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications."[15]

The Commission, however, went on in the *Inquiry* to note various objections to unregulated CATV systems. It pointed out that CATV systems appeared to be adversely affecting small local stations, and that such adverse effect seemed to be growing daily.[16] The strongest complaint put forth by the local broadcasters in the *Inquiry* was that the CATV systems were expanding their services by means of point-to-point common carrier microwave links.[17] These transmissions enabled the CATV operators to carry signals as far as three hundred miles, and to bring signals into areas which

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11 26 F.C.C. 403 (1959) [hereinafter cited as *Inquiry*].

12 *Id.* at 431.

13 *Id.* at 426-28.

14 *Id.* at 427-29. *See also*, Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 253-55 (1958).

15 *Id.* at 429. The FCC was granted the power to regulate ". . . all interstate and foreign communication by wire or radio. . . ." 47 U.S.C. § 152(a) (1964).

16 *Inquiry*, 26 F.C.C. 403, 421-24 (1959).

17 *Id.* at 408.

could not have otherwise received the transmissions.[18] The Commission also went on to state that it probably would have jurisdiction over individual CATV systems if a complaining broadcaster could prove a substantial public detriment due to any economic injury which such broadcaster would suffer, but dismissed such an approach as being fractional, and not appropriate as a solution to the problem at hand.[19]

It is noteworthy that the FCC stated in its *Inquiry* that a CATV system's use of common carrier microwave for long-range transmission of its signals was no basis for jurisdiction. The Commission described the position that such use was a basis for jurisdiction as a logical absurdity.[20] However, in spite of this supposed absurdity, the FCC adopted a very similar view in *In re Carter Mountain Transmission Corp.*[21] In *Carter Mountain,* the FCC denied a license for the construction of a microwave transmission and relay network on the ground that the proposed use of the facility by a CATV system would substantially impair the economic situation of a local television station. The Commission said:

> We do not agree that we are powerless to prevent the demise of the local television station, and the eventual loss of service to a subtantial population. . . .[22]

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18 A proposal submitted to the City Council of the City of Whitehall, Ohio, in 1965 indicated an intention to carry signals from Chicago and New York into the Columbus, Ohio, market area. Although a long-term franchise was granted, this system has never been put into operation, CAPITOL CABLEVISION, INC. PROPOSED COMMUNITY ANTENNA TELEVISION SERVICE FOR WHITEHALL, OHIO (1965). *See* 26 F.C.C. 403, 409 (1959).

19 *Inquiry,* 26 F.C.C. 403, 431 (1959). From the foregoing facts, a strong argument can be made that the FCC did not deny power to regulate CATV in its *Inquiry,* but merely expressed an opinion that congressional action was more appropriate and desirable, and a warning that if appropriate legislation were not forthcoming the FCC might take the opportunity to go ahead on its own, as it actually did, and assume control over the CATV industry.

20 *Id.* at 432. The Commission stated:

> Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration.

21 32 F.C.C. 459 (1962), *affirmed sub nom.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963) [hereinafter cited as *Carter Mountain*].

22 32 F.C.C. 459, 465 (1962).

The FCC noted that the application could be resubmitted if the CATV operator would refrain from duplicating the programs of the local station and agree to carry the signal of the local station on request.[23] The Commission specifically overruled any portions of its conclusions in the *Inquiry* which were inconsistent with this decision.[24]

Carter Mountain represents the assumption by the FCC of control over CATV systems making use of microwave transmissions. The next step in asserting jurisdiction over CATV systems was to assume control over systems not using microwave transmissions. In 1965, the Commission issued its *First Report and Order (CATV)*[25] in which it first officially assumed jurisdiction over CATV in general. The Commission noted the CATV industry's unexpected and rapid expansion had made it imperative for the FCC to act, especially in view of Congress' repeated refusals to enact any legislation.[26] The Commission, drawing on information supplied in several economic studies on the effects of CATV on broadcasters,[27] decided that the possible adverse effect of CATV on local broadcast stations was too significant to permit CATV to go any longer without regulation.[28] The Commission overruled most of its conclusions in *Inquiry*, and asserted jurisdiction over CATV systems which did not use long-distance microwave as well as those which did.[29] In the *First Report*, the FCC adopted only rules for microwave-served systems, however, and refused to regulate ordinary, or off-the-air, stations.[30] The rules included requirements that the CATV systems carry all local stations which requested the service, take special precautions concerning the strength and clarity of such local signals, and refrain from duplicating programs carried on local stations for a period of fifteen days before and after such programs were shown on local stations.[31] The

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23 *Id.*

24 *Id.*

25 28 F.C.C. 683 (1965).

26 *E.g.*, H.R. 13286, 89th Cong., 2d Sess. (1966). *See* United States v. Southwestern Cable Co., 392 U.S. 157, 171 n.30 (1968).

27 *See, e.g.*, Seiden, *supra* note 7.

28 *First Report*, 38 F.C.C. 683, 713-15 (1965).

29 The FCC printed a memorandum on its regulatory authority over CATV as part of its *Notice of Proposed Rule Making*, 1 F.C.C.2d 453, 478 (1965).

30 *First Report*, 38 F.C.C. 683, 741-46 (1965). An off-the-air CATV system takes its signals strictly from the broadcasted signals available to its master antenna, and makes no use of microwave transmission.

31 *Id.* at 742-43. At the same time, the Commission established a new microwave

Commission concluded that it had sufficient authority under the Communications Act of 1934[32] to effectively regulate all CATV systems, but asserted such jurisdiction only over the microwave-served systems. Simultaneously with the *First Report* the Commission issued a *Notice of Proposed Rulemaking*[33] in which it published a memorandum asserting its authority to regulate CATV and defined issues to be considered in a subsequent hearing to determine the character and necessity of rules governing the operation of all CATV systems.

The result of the hearing called in the 1959 notice was the *Second Report and Order (CATV)*.[34] The *Second Report* ordered all CATV systems to carry, on request by the broadcaster, all local stations up to the system's full capacity.[35] It also ordered all CATV systems to take special precautions to keep local signals from being degraded and to carry the local stations on their regular channels.[36] Higher priority stations which came under the carriage requirement were also permitted to demand non-duplication of programs on other stations of lower priority which the CATV system carried.[37] The rules further provided that no CATV system operating within the Grade A contour of a station in one of the "top 100" television market areas could import new signals into the area if such signals did not already exist as a Grade B signal in the area. The FCC had the right to waive the "top 100" rule on application by the CATV operator and after a hearing.[38] February 15, 1966, was specified as the "grandfather date," and systems operating on or before that date were permitted to continue operations without being disturbed.[39]

radio relay service to be known as the Community Antenna Relay (CAR) service. The wave length to be used by CAR was to be reserved for CATV use exclusively.

32 47 U.S.C. § 152(a) (1964).

33 1 F.C.C.2d 453 (1965).

34 2 F.C.C.2d 725 (1966).

35 *Id.* at 746.

36 *Id.* at 753.

37 *Id.* at 746.

38 *Id.* at 782. The carrying strength of television broadcast signals is measured according to mathematically predicted "contours" or zones of approximately equal strength. These contours are defined as follows:

Principal City Contour: the immediate area within the city limits of the city wherein the broadcast station is located. This signal is of the highest priority.

Grade A Contour: a line along which 70% of the home receivers will receive a good signal 90% of the time.

Grade B Contour: a line along which 50% of the home receivers will receive a good signal 90% of the time. *See* 47 C.F.R. 73.683, *et seq.* (1968).

39 February 15, 1966 was chosen as the "grandfather date" due to the advance

However, the Commission reserved the right to forbid the expansion of such "grandfather systems" into new geographical areas unless it was determined after a hearing that expansion would be within the public interest.[40] New CATV systems were required to publish notice of their commencement of operations thirty days before doing so, in order to give the broadcasters a chance to file protests with the FCC.[41] Finally the FCC provided for temporary relief pending hearings on the public benefit of CATV construction or expansion.[42]

Taking advantage of the Commission's new position on CATV, Midwest Television, Incorporated, a licensee of KFMB-TV, San Diego, California, filed a petition with the FCC protesting the operation of certain CATV systems in the San Diego market area. In this petition, Midwest alleged the respondents were carrying into the area the signals of from six to nine Los Angeles television stations,[43] thereby injuring the petitioner as well as other broadcasters in the San Diego area. Midwest claimed the importation of such signals was contrary to the public interest in that it had an adverse economic impact on the local stations. The petition prayed, *inter alia*, for temporary relief pending a hearing on the merits of the claims.[44] After examining the pleadings and affidavits the FCC determined sufficient evidence had been presented to warrant a full evidentiary hearing and ordered the temporary relief requested.[45] Respondents appealed the Commission's action to the Ninth Circuit Court of Appeals, where the only questions before the court were the FCC's power to regulate CATV systems and grant temporary relief as provided in the *Second Report*.[46] In determining that the FCC acted without authority, the court stated the FCC was without power to regulate any field of communications which the Commission did not license; and therefore the Commission was not empowered to order the type of temporary relief in the case before it.[47] The court of appeals' de-

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notice of the publication of the rules for the operation of non-microwave CATV which appeared on that date. *See* 47 C.F.R. 74.1107(d) (1968).

40 *Second Report*, 2 F.C.C.2d 725, 765-66 (1966).

41 *Id.* at 765.

42 *Id.* at 766.

43 Southwestern Cable Co. v. FCC, 378 F.2d 118 (9th Cir. 1967), *aff'd*, 392 U.S. 157 (1968).

44 *Midwest Television Inc. (KFMB-TV)*, 4 F.C.C.2d 612, 613-17 (1966).

45 *Id.* at 624.

46 Southwestern Cable Co. v. United States, 378 F.2d 118, 120-21 (9th Cir. 1967), *aff'd*, 392 U.S. 157 (1968).

47 *Id.* at 124.

cision was based on *Board of Regents v. Carroll*,[48] in which the United States Supreme Court limited the authority of the FCC to those areas of communications which required the issuance of a license for operation. On further appeal, however, the Supreme Court overruled the court of appeals and upheld the power of the FCC to regulate CATV. The Supreme Court held that the Communications Act of 1934[49] gives the FCC the power to regulate any form of communications, including CATV.[50]

Since the decision in *Southwestern Cable*, the courts have upheld the rules promulgated in the *Second Report* several times.[51] Apparently encouraged by the support it has thus received, the FCC on December 13, 1968 adopted a *Notice of Proposed Rule Making*[52] to extend the present regulation. The Commission stated that, with technical advances in the industry the cable companies were able to put more signals on one cable and were becoming more anxious to originate their own programming.[53] In the final hearing of *Midwest Television, Inc. (KFMB-TV)*,[54] *(Southwestern Cable)*, the CATV operators, were permitted to originate their own programming on a trial basis, without the sale of advertising.[55] The cable companies in that case had expressed a desire to use their cable facilities to transmit local sports, local news and public service programming originating from their own studios. In the final hearings, where the question was first presented, the FCC permitted the cable companies to originate programming, but not to finance it by the sale of advertising. In the 1968 notice, the Commission announced it would hold new rule-making proceedings on the subject of CATV regulation.[56] Among the proposed rules included in the notice was a requirement that all CATV systems originate their own programming before being permitted to use off-the-air signals.[57] The Commission proposed

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48 338 U.S. 586 (1950).

49 47 U.S.C. § 150 *et seq.* (1964).

50 United States v. Southwestern Cable Co., 392 U.S. 157, 181 (1968).

Mr. Justice Douglas and Mr. Justice Marshall took no part in the consideration of this case. Mr. Justice White concurred in a separate opinion, based on the statutory authority found in the Communications Act of 1934, 47 U.S.C. §§ 301, 303.

51 *E.g.*, Black Hills Video Corp. v. FCC 399 F.2d 65 (8th Cir. 1968).

52 33 Fed. Reg. 19028 (1968).

53 *Id.*

54 13 F.C.C.2d 478, 503 (1968).

55 *Id.* at 510.

56 *1968 Notice*, 33 Fed. Reg. 19028 (1968).

57 *Id.* at 19030.

that commercial advertising be permitted to defray the cost of the program origination.[58] Other provisions of the rules would apply political "equal time" rules to CATV,[59] increase the technical standards for non-degradation of broadcast signals,[60] and forbid the ownership of a CATV system by a television broadcaster whose Grade B signal reaches the locale of the CATV system.[61] The Commission is also considering a proposal to subject the CATV systems to a procedure of licensing and renewal similar to that applied to television broadcasters.[62] No "grandfathering date" would be specified for the new regulations, so that they would apply to all CATV systems.[63] The FCC provided that in the interim, all petitions by CATV operators for waiver of the existing rules would be tabled. Oral argument was set for January of 1969, and written argument would be received as late as March of 1969.[64] No date was estimated for the final decision.

The rules proposed for the hearings appear to indicate some new policy on the part of the FCC. The old policy, of marking time waiting for the expected Congressional action, was supplanted in the *Second Report* by the first sketchy and rather general regulation of CATV. Now, in the 1968 notice, the Commission has indicated an intention of occupying the entire field with total regulation. One portion of the area of CATV operation which the FCC cannot and will not regulate, however, is concerned with the uniquely local problems involved with CATV.

In the past years, only one level of governmental authority has been sure of its power to control CATV operations—the FCC refused to act, the states feared preemption should they take the initiative—only local governmental authorities felt the immediate and pressing need to take action against CATV. The cities, faced with problems that required immediate solution waded into the fray, and with no little success.

B. *Local Regulation of CATV*

CATV holds the most interest for the municipalities which have little or no off-the-air television reception. The community

58 *Id.*
59 *Id.* at 19031.
60 *Id.* at 19032.
61 *Id.* at 19031-32.
62 *Id.* at 19032.
63 *Id.* at 19031.
64 *Id.* at 19038-39.

without sufficient television coverage is anxious to see the installation of a cable so that it, too, may enjoy the American Way of Life. Larger markets, the "top 100" hierarchy,[65] are also concerned, but for different reasons. The broadcasters located in their cities perform local services which the municipalities fear cannot be supplied by the cable. While this notion is somewhat obsolescent in view of the trend toward program origination, it is still an important consideration. Viewed from a different angle, however, the cities are eager to exercise at least some control over the operations of a CATV system for one basic reason: the systems make excellent profits, and the cities, by imposing license or franchise fees, will be able to gain a source of revenue.[66] On the state level, little has been done in the way of CATV regulation other than the enactment of "enabling statutes" which permit the cities to do what they already intended. Most states realize that no agency but the FCC would have the power to enact comprehensive regulation of CATV industry; it is clear that a national policy is necessary, and fragmented regulation would be out of place. The only reasonable theory which the states would be able to invoke to regulate CATV effectively would be the state's limited control over public utilities. This view has not been generally accepted, and the Attorneys-General of various states have indicated that the state public utilities authorities have no jurisdiction.[67] Another difficulty in state level regulation of CATV is that such regulation would probably have to be comprehensive, and:

> . . . only the Congress can disturb the delicate balance which it has already established among the various media involved in providing the public with television broadcast service.[68]

Most states, however, have approached the genuine local problems of CATV by leaving the question to the municipalities which experience the difficulties first hand. With the state removed from the area, it would be impossible for the FCC to determine in every instance what route the cable is to take through the city, how to zone the location of the master antenna, and what use of dedicated right-of-way is to be made in the process of supplying a community with

65 A current listing of the "top 100" television markets may be found appended to the *1968 Notice*, 33 Fed. Reg. 19028, 19039 (1968).

66 Such revenue is generally obtained from the CATV operator in the form of a franchise fee, usually in the form of a percentage of the receipts of the system.

67 *See, e.g.*, 10 R.R. 2058; 12 R.R. 2094; 14 R.R. 2063; 14 R.R. 2064.

68 L'HEUREUX, CATV—A TELEVISION SERVICE BESET, 19 FED. COM. B.J. 27, 30 (1964-65).

a common antenna. In *Nugent v. East Providence*,[69] the Rhode Island Supreme Court indicated, however, that the municipality had no right to grant an exclusive franchise for the use of city streets to hang a cable.[70] That court indicated the entire responsibility for streets and highways was in the hands of the state, and was not delegated to the municipality for the purpose contemplated. In Illinois, however, the courts seem to think that unlike Rhode Island, Illinois had too many streets and highways for the state legislature to keep track of, and validated a franchise ordinance in *Illinois Broadcasting Co. v. Decatur*.[71] In *Decatur*, the city passed a three-part ordinance granting a cable company the non-exclusive right to the use of the streets and alleys, specifying technical standards to be followed, and providing for criminal sanctions against anyone who made such use of the streets without permission.[72] The criminal portions of the ordinance were repealed, and the ordinance passed subject to approval by the CATV operator. The ordinance provided for an annual payment to the city of $10,000.00, or six per cent of the gross income of the system, whichever was greater, to cover the cost of using the streets. The court found the city to have the authority to franchise the system regardless of the state enabling act[73] which was passed after the ordinance had gone into effect. The finding of authority was based on the inherent power of a municipal corporation to exercise control over its streets and alleys and their use.[74] The court also found no problem in the apparent preemption by the FCC of the authority to prescribe standards of operation, because the CATV system was required to approve the terms of the ordinance before it went into effect and, therefore, had accepted the standards voluntarily.[75] By the same reasoning, the court also found the annual payment not to be a tax.[76] While the *Decatur* case is probably indicative of the present trend of decision, a federal district court in Pennsylvania reached the same result by a very different route. In *Dispatch, Inc. v. Erie*[77]

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69 238 A.2d 758 (1968).

70 *Id.* at 761.

71 96 Ill. App. 2d 454, 238 N.E.2d 261 (1968).

72 *Id.* at 455, 238 N.E.2d at 262.

73 ILL. REV. STAT. ANN. ch. 24, § 11-42-11 (Supp. 1968), provides:

The corporate authority of each municipality may license, franchise and tax the business of operating a community antenna television system. . . .

74 96 Ill. App. 2d 454, 460-61, 238 N.E.2d 261, 264 (1968).

75 *Id.* at 461, 238 N.E.2d at 265.

76 *Id.* at 462, 238 N.E.2d at 265.

77 249 F. Supp. 267 (W.D. Pa. 1965).

the court noted that once broadcast, television signals enter the public domain and therefore are no longer the concern of the FCC as far as the regulation of a distribution system would be involved, or at least the regulation of such a system would not interfere with the FCC's operations in the same field.[78] One might question whether this theory of the operations of a CATV system will stand in the face of the proposed FCC regulations.

In the 1968 notice, the FCC asked that argument be presented on the advisability of the current practice of unrestricted local regulation of some aspects of CATV.[79] The Commission noted that CATV had grown and developed as a non-competitive natural monopoly,[80] and that there had been no choice of systems in communities where operations had begun. The Commission feels that the consumer can be best protected by individual consideration of such matters as the technical, financial, and character qualifications of the applicant, the route the cable is to take through the city streets, and other peculiarly local questions.[81] In Section V of the 1968 notice, the FCC outlined the general areas of inquiry to be pursued in the hearings, and asked:

> What should be the division of regulatory functions between Federal and state or local authority with respect to the local communication system or systems . . . ?[82]

Thus, local regulation of CATV systems is not to be entirely preempted. The Commission recognizes that localities where systems are to be constructed are faced with problems which only they can solve; the Commission is willing to allow them to go ahead on their own if necessary. While a small minority of state legislatures have reserved the right to regulate CATV on the local level to themselves, most

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78 *Id.* at 270.

79 *1968 Notice*, 33 Fed. Reg. 19028, 19031 (1968).

80 While it is ". . . unreasonable, *per se*, to foreclose competitors from any substantial market." International Salt Co. v. United States, 332 U.S. 392, 396 (1947), if the monopoly flows naturally from the economic situation, or is "thrust upon" the monopolist, no violation of federal antitrust laws will be found, Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960). In the case of CATV operations, the monopolies are natural, in that it would be economically wasteful to attempt to operate two systems with separate cables and separate master antennas in the same area, where the television signals available would be the same for each system.

81 *1968 Notice*, 33 Fed. Reg. 19028, 19031 (1968).

82 *Id.* at 19038.

have given the authority to the municipalities to decide in their own inimitable way.

C. *Copyright and Unfair Competition*

When CATV systems first began to compete with broadcasters, the television broadcasters decided that such competition must surely be unfair. Their first complaint, however, arose not from some abstract notion of unfairness, but the real world of copyright law. They claimed that by showing licensed material in the area where the broadcaster was to have exclusive "first-showing" rights the CATV operators violated their license rights and infringed the copyright. A recent Supreme Court decision, however, has apparently closed the question of copyright liability in favor of the CATV operator.[83]

The Copyright Act requires a "public performance" of a copyrighted work before infringement can be found.[84] There can be no question that CATV transmissions are "public";[85] the difficulties have arisen in defining performance. The district court in *United Artists Television, Inc. v. Fortnightly Corp.*,[86] held that the activity of the CATV system in demodulating and retransmitting the signals received had in effect electronically performed the copyrighted work of the broadcaster.[87] The court of appeals, also finding a performance, affirmed on different theories. Rejecting the contentions of the lower court, the court of appeals placed greater reliance on the early radio case of *Buck v. Jewell-LaSalle Reality Co.*,[88] holding that the CATV system had made a substantial contribution to the viewing of the copyrighted work in question, and had thereby performed it.[89] The Supreme Court in *Fortnightly* suprisingly reversed both courts, adopting the *passive antenna* theory of CATV operation. The Court held that the mere receiving of television signals was not a performance within the meaning of the Copyright Act. CATV systems were analogized to *audiences* rather than *performers* in the court's holding that only a performer could infringe a copyright.

83 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). *See*, Note, 29 OHIO ST. L.J. 1038 (1968).

84 17 U.S.C.A. § 1(c), (d) (1964).

85 *See* M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923) (radio broadcast).

86 255 F. Supp. 177 (S.D. N.Y. 1966).

87 *Id.* at 214.

88 283 U.S. 191 (1931).

89 United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 879 (2d Cir. 1967).

The CATV system merely extended the range of television reception, and was in effect exempted from the operation of the copyright laws. The Supreme Court left the question of other means of finding infringement of copyrights by CATV systems to the determination of Congress and refused to construe CATV into the Act.[90] The CATV system operated by the Fortnightly Corporation, however, did not originate programming, make use of microwave transmissions for long-distance carriage of signals, and did not sell advertising time. The case, then, does not really answer the final question: Should a CATV system which carries copyrighted material outside the intended market area into a potential market which has not been exploited be held to violate the provisions of the Copyright Act? Since the Supreme Court has not specifically overruled the earlier decisions the way is apparently open for the Court to find, in a proper case, that a CATV system may still be infringing a copyrighted work.

Since copyrights are rarely obtained on programming other than that produced by the major networks, and then only occasionally, the problem to the local broadcaster is not really a copyright problem, but one of "unfair" competition.[91] The FCC's allocation of broadcast frequencies for television is based on technical factors—range, geography, interference between close frequencies—and the television market area has not necessarily conformed to the optimum.[92] CATV systems are able to carry signals across natural and man-made barriers which would otherwise block the stations, and thus provide relief from the inequalities of the FCC television allocation plan.[93]

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90 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401-02 (1968).

91 Broadcasters' suits on unfair competition theories, however, have been remarkably unsuccessful. Most courts seem to feel that:

> [t]he fact that one receives and utilizes the telecast for commercial purposes by receiving, amplifying, and transmitting it to others for a compensation does not make such activity subject to the condemnation of unfair competition or interference with favorable contractual provisions enjoyed by the television broadcasting company. Herald Publishing Co. v. Florida Antennavision, Inc., 173 So. 2d 469, 474 (Fla. Ct. Apps. 1965).

92 L'Heureux, *supra* note 68, at 35.

93 Television signals are carried on FM carrier waves which can travel only in straight lines, and are blocked by nearly anything which may come in their path; thus, geography and city skylines play a much greater part in the allocation of channels than they should to provide optimal markets. For a detailed technical description of the operations of CATV, see the opinion of the District Court in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, *aff'd*, 377 F.2d 872, *reversed*, 392 U.S. 390 (1968).

The broadcasters are unable to provide service to the actual economic area they are located in, in many instances, but are not to be faulted for obeying the laws of physics. CATV is able to provide service to the specific market which is concerned and not just the reception area which may be reached. When the actual effect of the CATV operation is to increase the market for the programming of a particular area to the optimal economic market, surely any complaints the broadcaster might have about such an expansion of his audience cannot be acceptable.[94] The television broadcaster is in business basically to sell large audiences to advertisers; the larger the audience he can raise, the higher the rates he can charge. Thus the operations of CATV systems in some areas are highly beneficial to the broadcasters. When, however, the CATV carries the signals of the broadcasting station far across the country into areas totally unknown to the broadcaster and the advertiser, the only effect such carriage can have would be to make future attempts to sell the same program material futile in the area to which it was carried: the program has been viewed once, and cannot be sold profitably. This reasoning would apply to copyrighted material, but the non-copyrighted programming of the local broadcaster, it would seem, would surely deserve some protection. However, to charge viewers for the reception of television would apparently be adverse to the policies of the FCC and the government to ". . . secure the maximum benefits . . . to all the people of the United States."[95] Since subscribers to CATV operations elect to pay the charges themselves, and since there is service available off-the-air (at least in theory), the CATV systems do not violate this policy. But to charge the CATV operator for the use of programming material would, in effect, be charging the subscribers twice for the same programming. The costs of American television are included in the price of every advertised product purchased in this country. The FCC, in view of judicial acceptance of its jurisdiction, has recognized, at least, its duty to "do something" about the problem of use of program material. In the 1968 notice, the Commission, after discussing its responsibility to the CATV systems to see that they are properly brought up stated:

> We conclude that it would not be consistent with such responsibilities to permit the growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition is eliminated.[96]

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94 SMITH, CATV—A TAINTED VIRGIN?, 27 FED. B.J. 451, 463 (1967).

95 National Broadcasting Company v. United States, 319 U.S. 190, 217 (1943).

96 *1968 Notice*, 33 Fed. Reg. 19028, 19034 (1968).

The Commission made one suggestion for a possible rule: that the CATV be required to obtain the permission of the broadcaster to retransmit his signal over long distances.[97] The effect of such a rule, however, would in all probability be to end the long-distance transmission of television signals. The formulation of other methods of solving the difficulty was left to argument by interested parties.[98] The Commission did note, however, that it would take no action "until an appropriate period is afforded to determine whether there will be congressional resolution of this crucial issue of unfair competition with indeed congressional guidance in this whole field."[99] One might note that the last time the Commission waited for congressional action, it was nine years before any action was actually taken.[100] This problem can no longer be ignored; nine years will be too long. While the *Fortnightly* decision appears to have exempted CATV from the copyright question, many economists feel that the competition offered television by CATV does injure the broadcasters.[101] Whether this competition is unfair is now apparently a question for Congress.

III. Adolescence and Maturity

The power of the Federal Communications Commission having finally been applied to the problems of the unrestricted growth of CATV, and to a small extent to the question of unfair competition, the CATV industry is still faced with a highly promising, even though regulated, future. The Commission in the 1968 notice indicated far reaching ideas for the future of CATV. The requirement of program origination will provide a non-broadcast competition for the small broadcasters and possibly force them to upgrade their standards to match those of the CATV which will have to depend at least in part on high quality to attract paying subscribers. Among other possibilities, the multi-channel capacity of CATV systems and the requirement of program origination would provide a possibility of "minority programming" by the CATV studios. The need to provide huge audiences to the advertisers will not face the CATV operator who will have to show something, whether or not anyone

97 *Id.*

98 *Id.*

99 *Id.*

100 A short chronology of the earlier attempts by the Commission to get congressional action is listed in *Notice of Proposed Rulemaking*, 1 F.C.C.2d 453, 464 n.13 (1965).

101 *See, e.g.*, Seiden, *supra* note 7.

watches it, and will therefore free the cable to produce the programs which the broadcasters claim they would like to produce but could not do so economically. Such programming could be aimed specifically at minority groups, whether racial or intellectual. Cultural programming of a special interest nature which is now avoided by the major television networks would be feasible in a system where another channel could be provided for ordinary fare. The Commission suggests areas of educational value especially in the Headstart program, where the cable's unused channels could provide services which educators now only dream about.[102] But these ideas are based on the present use of CATV as a carrier of ordinary television. Policy makers must climb out of the education/entertainment rut and consider the uses of a system described not as "a method of carrying television signals" but rather as *a comprehensive system of visual communication.* One concept of such broad vision is the FCC's decidedly "science-fictional" *wired city.*[103] The idea of cables, or bundles of cables, serving every home in an entire community, completely supplanting telephone, radio, television and all other forms of electronic communications with visual as well as aural contact, is a heady one indeed; such a system would surely hasten the "retribalization" of civilization as predicted by Marshall McLuhan.[104] The system could provide two-way services of all sorts: videotelephone (now supplied to 100 persons in the United States), photocopy newspapers (see an interesting story on the tube, push a button and receive a copy to read at your leisure), video catalogues (pushing the proper button will cause the item viewed on the screen to be delivered), televised classes where the student can actually ask questions and be answered by the professor, and a multitude of other services either presently thought too far-fetched or even undreamed of, including a form of "electronic democracy" which, by providing each voter in the community and eventually the country, with a direct say in the activities of the legislature (by button pushing), could provide a form of direct democracy unknown since the ancient Greeks. Such possibilities of the CATV systems may be in the future, but the beginnings of the electronic culture, like the atomic age, are already present and becoming more reality than dream. To stifle the development of such a future is beyond the capacity of any governmental agency, as well as beyond the capacity of

102 *1968 Notice*, 33 Fed. Reg. 19028, 19029 (1968).

103 *Id.*

104 M. McLUHAN, UNDERSTANDING MEDIA, THE EXTENSIONS OF MAN (1964).

the free enterprise system; the preferable means will eventually surface. The CATV system is a thing of the present as well as the future, and its possibilities cannot be ignored. The present system of channel allocation, dictated by the physical laws of interference as much as by policy, is inefficient and unrelated to market structure or demography; only the CATV system, by avoiding natural barriers, can provide service to the actual economic and social community, and by providing a common source of information bring that community closer to a single whole. The CATV industry at present, however, has been allowed to grow without control; there are inequities which must at present be corrected to avoid undue hardship to the broadcasting system which, after all, has done a fair job for twenty-nine years. In spite of future prospects, the CATV industry is a gangling adolescent looking for direction and discipline. With the proper and judicious application of both, the FCC can open to the present an industry of the future.

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